Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1244

HENRY J. WADDELL,
Petitioner,

vs.

PEPSI COLA COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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Petitioner, Henry J. Waddell, respectfully prays that a writ of certiorari issue to review the order, District of Columbia Court of Appeals, filed in this proceeding on October 7, 1977, and orders denying petitioner's request for reconsideration and hearing *en banc.* (See Appendix, pp. 2).

OPINION BELOW

The D.C. Court of Appeals, by order dated October 7, 1977, (Appendix 1), dismissed petitioner's appeal and, by

order dated January 5, 1978, Appendix 2, denied petitioner's petition for reconsideration and hearing *en banc.*

JURISDICTION

Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1257, as amended to July 29, 1970, Public Law 91-358, Title 1, Section 172(a), 84 Stat. 590. The ORDER of the Appellate Court was entered on October 7, 1977 (Appendix p. 1) and a petition for reconsideration and hearing *en banc* was timely filed and denied on January 5, 1978 (see Appendix pp. 2):

"On consideration of appellant's petition for hearing *en banc*, it is

ORDERED that appellant's petition is denied."

QUESTION PRESENTED

Does an Appellate Court have jurisdiction of a case on an untimely, improper and invalid notice of appeal, when there has been no judgment or final order entered by the trial court?

STATEMENT OF THE CASE

Petitioner lost part of his right index finger in an automobile collision on April 30, 1969. The facts of the accident and the manner in which petitioner was injured were stipulated to and incorporated into the pretrial order. The jury returned a verdict of $12,500.00 for the petitioner on April 11, 1972.

The respondent filed a Motion for a New Trial and/or a Motion for Judgment Notwithstanding the Verdict. The trial court, denied the motion. The respondent filed an

invalid Notice of Appeal from the order denying the motion. No judgment was entered by the trial court. The appellate court entertained the Notice of Appeal and entered a judgment reversing the "judgment" of the trial court. A judgment had never been filed or entered by the trial court and the Clerk of the Court pointed this out to the trial judge and withheld the proposed order from his signature, stating that no judgment had been filed or entered on the docket and that the Notice of Appeal was from a denial of defendants Motion for Judgment N.O.V., not from a judgment, stating that there was no provision of rule or law which permitted such an appeal.

The case was assigned a new trial calendar number and set for another jury trial for October 4, 1976, with notices being sent to all parties. The respondent did not appear on the day of the trial and the petitioner filed a praecipe asking for default for his non-appearance and non-explanation. The assignment Clerk referred the matter to the Motions Calendar for a hearing. On April 8, 1977 (six months later and without a hearing and with none of the participants present) the trial judge filed an Order directing a verdict for the Respondent, quoting as its authority, the Appellate Court Judgment. Petitioner appealed, respondent filed a Motion to Dismiss the appeal or in the Alternative for Summary Affirmance. The Appellate Court dismissed petitioners appeal.

STATUTES INVOLVED

FIFTH AMENDMENT, U.S. Constitution:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . . "

REASONS WHY THE WRIT SHOULD BE GRANTED

Petitioner states that when the jury returned a verdict for him and the trial court did not enter a judgment on the jury verdict and the respondent filed an untimely, improper and invalid notice of appeal, petitioners rights were prejudiced. The denial of his right to appeal or to seek execution of a judgment was unconstitutional. *There was no final order, no judgment and there can be no appeal from a jury verdict or from the denial of a J.N.O.V. or New Trial Motion.*

The U.S. Supreme Court has held that a jury verdict was not a final decision for the purpose of timeliness of Appeal where there was nothing meeting the requirement of a "separate document" for a judgment under Rule 58 of the Federal Rules of Civil Procedure. Further, some Courts have disregarded the clear provision of Rule (79A) or (58) that "every judgment must be set forth on a separate document and must be entered on the docket" and have accepted appeals, but a unanimous Supreme Court repudiated these few aberrant decisions and has held it a requirement that the judgment be set forth in a separate document and must be mechanically applied in all cases. (*United States vs. Indrelunas*, 411 U.S. 216, 93 Sup. Ct. Reporter 1562).

Petitioner was denied equal treatment of the law and his property was taken without due process of law[1], and

[1] Fifth Amendment, U.S. Constitution.

that an assault was committed upon the judicial process, in which he sought relief.[2]

[2] *Snyder vs. Mass.*, 291 U.S. 97 (1934), page 105. The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscious of our people as to be ranked as fundamental.

CONCLUSION

The Petitioner asks that the Petition For a Writ of Certiorari to the District of Columbia Court of Appeals be granted and asks that this Court *order that judgment be entered for plaintiff on the jury verdict of April 11, 1972.*

Respectfully Submitted,

WILLIAM A. BURLESON
1000 Pennsylvania Avenue, S.E.
Washington, D.C. 20003

Attorney for Petitioner

APPENDIX

DISTRICT OF COLUMBIA COURT OF APPEALS

[Filed Jan. 5, 1978]

No. 12230 JANUARY TERM, 1978

HENRY J. WADDELL, Appellant,

v. **CA 22207-70**

PEPSI COLA COMPANY, Appellee.

BEFORE: Newman, Chief Judge; Kelly, Kern, *Gallagher, Nebeker, *Yeagley, Harris, Mack, and Ferren, Associate Judges; and *Pair, Associate Judge, Retired.

ORDER

On consideration of appellant's petition for reconsideration and rehearing *en banc*, and it appearing that no judge of this Court has called for a vote thereon, it is

ORDERED that the *en banc* petition is denied; and it is

FURTHER ORDERED by the merits division that the petition for reconsideration is denied.

PER CURIAM.

---

* Denotes merits division

Copies to:

Honorable Orman W. Ketcham
Clerk, Superior Court

William A. Burleson, Esquire
1000 Pennsylvania Avenue, S.E., 20003

Austin F. Canfield, Jr., Esquire
4400 Jenifer Street, N.W., #355, 20014

APPENDIX

DISTRICT OF COLUMBIA
COURT OF APPEALS

[Filed October 7, 1977]

No. 12230 JANUARY TERM, 1977

HENRY J. WADDELL, Appellant,

v.

CA 22207-70

PEPSI COLA COMPANY, Appellee.

BEFORE: Gallagher and Yeagley, Associate Judges, and Pair, Associate Judge, Retired.

ORDER

The Court has pending appellee's motion to dismiss and the pleadings filed with respect thereto. Upon consideration thereof and of the record on appeal and appellant's brief, it is

ORDERED that appellee's motion be granted and this cause is hereby dismissed.

PER CURIAM

Copies to:

Honorable Joyce Hens Green
Associate Judge, Superior Court of the District of Columbia

Clerk, Superior Court of the District of Columbia

William A. Burleson, Esquire
1000 Pennsylvania Avenue, S.E., 20003

Counsel for appellant.

Austin F. Canfield, Jr., Esquire
4400 Jenifer Street, N.W., Suite 355, 20014

Counsel for appellee.

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v.

PEPSI COLA COMPANY, *Respondent*

On Petition For A Writ of Certiorari To The District of Columbia Court of Appeals

MEMORANDUM FOR RESPONDENT PEPSI COLA COMPANY IN OPPOSITION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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On Petition For A Writ of Certiorari To
The District of Columbia Court of Appeals

MEMORANDUM FOR RESPONDENT PEPSI COLA COMPANY IN OPPOSITION

PROCEEDINGS BELOW

The Petitioner herein, Henry J. Waddell (hereinafter Waddell) commenced a personal injury suit against the Pepsi Cola Company, (hereinafter Pepsi) alleging personal injuries as a result of an automobile accident on April 30, 1969. The facts of the accident were disputed (not stipulated to and incorporated into the Pre-Trial Order as alleged by Petitioner in his Statement Of The Case). Motions for directed verdict were denied and the case was given to the jury which returned a verdict in favor of Waddell on April 11, 1972.

Thereafter, Pepsi filed a Motion for New Trial and/or judgment N.O.V. Both Motions were denied by the trial court following which Pepsi timely noted an appeal.[1]

The argument to the Court of Appeals was based on the manner in which the accident occurred and injury was sustained. The Court of Appeals agreed with Pepsi that the trial court erred in submitting the case to the jury as Waddell's evidence respecting the cause of the accident and injury amounted to pure speculation. The jury verdict was reversed. The case was not remanded back to the trial court for any further proceedings. (See *Pepsi Cola Company* v. *Waddell,* 304 A.2d 630 (1973), Appendix 1).

No further action occurred in this case until three years thereafter when in 1976 Waddell had the case re-calendared for trial. Pepsi, through its counsel, advised the Assignment Commissioner that the case was improperly scheduled for trial (Appendix 2) and thereafter the case was removed.

Notwithstanding its removal, Waddell appeared in court on the date the case had been set (October 4, 1976) and sought to enter a default against Pepsi (Appendix 3). Thereafter, on December 17, 1976 Waddell attempted to schedule a hearing so as to establish damages by ex-parte proof (Appendix 4).

The default sought was not entered and thereafter, on March 23, 1977 Waddell requested the Clerk to

---

[1] While Waddell contended in a second appeal thereafter and in his Petition for Certiorari that no judgment was properly entered by the trial court and therefore the appeal was improper, such an argument was not raised during the appeal of Pepsi.

refer the case back to the trial judge for a "ruling" (Appendix 5). Thereafter an undated Order from the trial judge was received by counsel for Pepsi (Appendix 6) and following this Waddell noted an appeal.

Following notice of the appeal Pepsi filed a Motion to Dismiss, which Motion was subsequently granted by the District of Columbia Court of Appeals (Appendix 7). Waddell filed a Petition for Reconsideration and Rehearing En Banc which Petition was denied. (Appendix 8)

REASONS FOR DENYING PETITION

1. Waddell has had his day in court. His case was presented to a jury (albeit improperly) and a verdict was returned. However, the District of Columbia Court of Appeals ruled that the case should have not been presented to the jury and reversed the trial court's denial of the Motion for Directed Verdict made by Pepsi.

2. There was nothing thereafter for Waddell to do except to file a Petition for Writ of Certiorari which was not done. Waddell thus acquiesced in the Appellate decision.

3. The attempt to resurrect this case and to reschedule it for trial was in point of fact a nullity. Waddell had no basis for doing so and despite several attempts at legal maneuvering, he was unable to force the case back for a second trial.

4. The referral of the case to the trial judge and the issuance of the Order by the trial judge directing a verdict for Pepsi was also a nullity. The trial court had no authority to entertain the case or to issue any Order and the same is truly without any legal significance.

5. The appeal taken from the Order of the trial court is also a nullity. Waddell already had his opportunity to present his case in the first appeal. The Court of Appeals did not agree with him and felt that his evidence was lacking in several essential areas.

6. The series of legal attempts to reinstate this cause of action are without proper foundation and have succeeded in causing Pepsi to incur substantial additional expenses to defend against the present efforts of Waddell, none of which ever should have been incurred in light of the opinion of Judge Yeagley.

CONCLUSION

Waddell's Petition for a Writ of Certiorari is without foundation and is substantively unworthy of review. Accordingly, it should be denied.

Respectfully submitted,

EDWARD J. GORMAN, JR. ESQUIRE
4400 Jenifer Street, N.W.
Suite 355
Washington, D.C. 20015

Attorney for Respondent
Pepsi Cola Company

Dated: March —, 1978

APPENDIX

APPENDIX 1

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 6706

PEPSI COLA COMPANY, APPELLANT

v.

HENRY J. WADDELL, APPELLEE.

Appeal from the Superior Court of the District of Columbia

(Argued November 22, 1972 Decided May 15, 1973)

Austin F. Canfield, Jr., with whom *Richard W. Galiher* was on the brief, for appellant.

William A. Burleson for appellee.

Before Gallagher, Pair and Yeagley, Associate Judges.

YEAGLEY, *Associate Judge:* This appeal is from a jury verdict against appellant in the amount of $12,500 for injuries allegedly resulting from a collision between appellant's vehicle and the vehicle operated by appellee.

Appellant company urges on appeal primarily that the trial judge committed error in allowing the case to go to the jury.[1] It contends that the evidence produced at trial was so deficient in essentials as to require the jury to speculate as to how the accident occurred. Appellant argues that the testimony proffered by the appellee did not demonstrate a scintilla of evidence of negligence on the part of the appellant. After a review of the record we agree and accordingly reverse.

The evidence presented at trial accepted in the light most favorable to the appellee (plaintiff below) reveals that

---

[1] Appellant's motions for directed verdicts were denied by the trial court both at the conclusion of the appellee's case in chief (Tr. at 70-75) and at the conclusion of the entire case (Tr. at 113-15).

appellee was proceeding west on H Street, N.E., approaching the intersection with Seventh Street. H Street has two westbound lanes in addition to a westbound curb parking lane and one eastbound lane.

There are several differences in the testimony of the drivers of the car and truck as to precisely what occurred at this point. According to appellee, he proceeded through the intersection at Seventh Street in the center lane (the farthest left westbound lane) and passed appellant's truck which was double-parked just across the intersection in the westbound lane nearest to the parking lane. As appellee passed appellant's truck he heard a noise and thought he had been hit by a following car. He stopped his vehicle in the center lane just beyond the truck and exited his car on the passenger side to inspect the damage. He found some debris from a previous accident, and concluded his vehicle had not been hit. Appellee then proceeded to get back into his car through the passenger door. He said that as he opened the door it was hit in "the middle" by the appellant's truck, as it started to move in a westbound direction. The force was sufficient to cave in the door in a concave fashion severing one-half of appellee's right index finger. He did not testify as to where his finger was placed when the accident occurred. Neither did appellee tender any testimony as to what part of the truck hit the door, whether it was the bumper or the outside corner of the van. Nor does he contend that the door had been open for some time before it was hit, but rather it was struck as he opened it. It is impossible to arrive at a logical conclusion from the foregoing testimony as to what act of negligence caused the injury. In the course of this testimony the following exchange occurred:

> THE COURT: I suppose what the Court is concerned about is how did the truck manage to hit your finger without hitting you?

> THE WITNESS: It hit the door, sir. Just as I was going to get in—I hadn't got in the car, but it hit the door of my car.
>
> THE COURT: And your finger was between the truck and the door?
>
> THE WITNESS: No. It wasn't, sir.
>
> THE COURT: I'll leave it to you to explain it. I haven't got a clean picture of it. Mr. Canfield? [Tr. at 41.]

Whereupon cross-examination of the witness began.

Adding to the confusion, and left unexplained by the appellee, is his admission, when called as a witness for the defense, that his right rear door was also damaged in the accident, as reflected in his repair bill, and required three hours of labor to fix. Despite this testimony he also said at this point that there was only one impact, not two.

The incongruity of his entire testimony in view of the two damaged doors is highlighted by a part of his deposition which was read into the record as follows:

> "Question: Was any part of your body struck?
>
> Answer: Not one part. This is the amazing thing. I'm standing almost directly in front of the door.
>
> Question: Where was your right hand at that time?
>
> Answer: I just opened the door—and those doors are very heavy, sir, and to keep them from swinging back too far I caught it, and I opened it with this hand [indicating] and I know that it's heavy, and it was swinged back very hard. I put my hand up like this on the top of it to stop it from swinging back, swinging all the way back—" [Tr. at 96.]

The fact that two doors were damaged would seem to corroborate the testimony of the truck driver that there

were two impacts. The first when appellee's car got hung up on the truck's left rear bumper while trying to turn out and around the truck, and the second when the front door apparently was opened from the inside as the truck driver was proceeding a few feet forward in order to untangle the two vehicles and the left rear bumper of the truck struck the open door.

Appellant aptly contends that it was physically impossible for the accident to have happened as described by appellee. At oral argument, appellee's counsel, who also was trial counsel, upon being asked to enlighten the court as to how the accident occurred was not able to explain the occurrence.

As we stated in *Courtney v. Giant Food, Inc.*, D.C.App., 221 A.2d 92, 94 (1966):

> [A] jury should never be permitted to guess as to a material element of the case such as damages, negligence, or causation. See MacMaugh v. Baldwin, 99 U.S.App.D.C. 247, 239 F.2d 67 (1956); Reece v. Capital Transit Co., 97 U.S.App.D.C. 274, 230 F.2d 824 (1956); Jones v. District of Columbia, [D.C.Mun.App., 123 A.2d 364 (1956)] . . . .

The burden was on the appellee to establish a particular act of negligence on the part of appellant and that such act was the proximate cause of the injury.[2] This he has failed to do.

The question of law presented by the motions for a directed verdict "is not whether there is any evidence—a mere scintilla is not sufficient—but whether there is any upon which a jury could properly find a verdict for the party upon whom the onus of proof is imposed."[3] Appel-

[2] *Gunning v. Cooley*, 281 U.S. 90 (1930).

[3] *Baker v. D.C. Transit System, Inc.*, D.C.App., 248 A.2d 829, 831 (1969).

lee's strongest evidence, to which there is serious challenge regarding its admissibility, was appellee's testimony that he heard appellant's truck driver say he thought he could make it. It is not particularly important that this was denied by the truck driver for such a statement, without more, does not establish negligence nor does it explain in a causal fashion how appellee's finger was severed.

The evidence adduced at trial was not sufficient factually to permit a logical conclusion as to exactly what occurred and consequently it was insufficient to permit the submission of the case to the trier of fact.[4] When the evidence requires a jury to speculate as to negligenc or causation, a motion for a dircted verdict for defendent (appellant) must be granted.[5] Unfortunately, even when it is clear that the plaintiff was permanently injured, causation and negligence cannot be inferred from the mere fact of the injury.

The judgment of the trial court is

Reversed.

[4] *Id.; see also Gunning v. Cooley, supra.*

[5] *Baker v. D.C. Transit System, Inc., supra; Reece v. Capital Transit Co., supra; MacMaugh v. Baldwin, supra.*

APPENDIX 2

October 13, 1976

Mr. James H. Dawson
Interview & Judgment Officer
Superior Court of the District
of Columbia
440 - G Street, N.W.
Washington, D.C. 20001

Re: Henry J. Waddell v. Pepsi Cola Company
Civil Action No. 22207-70

Dear Mr. Dawson:

I am in receipt of a copy of a praecipe filed by Mr. Burleson in the above captioned matter. I am enclosing a photocopy thereof so that it will provide a ready reference.

The Clerk's Office should not receive this praecipe nor should any default be entered.

This case was tried more than two years ago and a judgment for the plaintiff was entered. The case was appealed by the defendant and the judgment was reversed outright. The case was not remanded back to the Superior Court for further trial. The case thus stood at a conclusion following the decision of the Court of Appeals, a copy of which I likewise enclose.

Mr. Burleson attempted to have the case set on the docket for trial, without my consent and shortly prior to the trial date, I contacted the assignment office and advised Mr. West of the decision of the Court of Appeals and the fact that it was inappropriate for this matter to be listed on the trial calendar. Mr. West advised that it was being removed from the trial calendar.

There was thus two reasons for no appearance on October 4, 1976. The first was the case was not properly on the

court docket and the second was that it had been removed after notification.

I would appreciate your advices that the praecipe seeking to enter the default has been rejected by the Court.

Sincerely,

AUSTIN F. CANFIELD, JR.

APPENDIX 3

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

THE 5TH DAY OF OCTOBER, 1976

No. CA 22207-70

HENRY J. WADDELL, *Plaintiff*

vs.

PEPSI COLA COMPANY, *Defendant*

The Clerk of said Court will enter a default pursuant to Superior Court Civil Rule 55(a). The above-entitled action was set for trial on October 4, 1976, and on February 5, 1976, both parties received written notice to appear. On October 1, 1976, both parties again were notified to be present in the Office of the Assignment Commissioner on October 4, 1976. The Plaintiff and his counsel did appear; Defendant and Defendant's counsel did not appear, nor was Plaintiff's counsel contacted regarding their non-appearance.

/s/ WILLIAM A. BURLESON
WILLIAM A. BURLESON #135-277
Attorney for Plaintiff
1000 Pennsylvania Avenue, S.E.,
Washington, D.C.

cc: AUSTIN CANFIELD, JR. ESQ.
Attorney for Defendant
4400 Jenifer Street, N.W.,
Washington, D.C.

APPENDIX 4

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

THE 17TH DAY OF DECEMBER, 1976

No. CA #22207-70

HENRY J. WADDELL, *Plaintiff*

vs.

PEPSI COLA COMPANY, *Defendant*

The Clerk of said Court will note plaintiff's application for judgment by default subject to ex parte proof of damages. Plaintiff requests the Clerk to schedule the above hearing pursuant to Superior Court Civil Rule 55 b(2).

WILLIAM A. BURLESON #135-277
Attorney for Plaintiff
1000 Pennsylvania Avenue, S.E.,
Washington, D.C.

cc: AUSTIN CANFIELD, JR., ESQ.
Attorney for Defendant
4400 Jenifer Street, N.W.,
Washington, D.C.

APPENDIX 5

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

THE 23RD DAY OF MARCH, 1977

No. 22207-70

HENRY J. WADDELL

vs.

PEPSI COLA CO.

The Clerk of said Court will refer the above case to Judge Ketcham, for ruling as requested in Plaintiff's letter dated January 25, 1977, filed herein. Matters previously brought before Civil Calendar continue —⁇—— March 23, 1977.

/s/ WILLIAM A. BURLESON
WILLIAM A. BURLESON
Attorney for Plaintiff
1000 Pennsylvania Avenue, S.E.,
Washington, D.C.
LI 4-4111

cc: AUSTIN CANFIELD, JR.
Attorney for Defendant
4400 Jennifer Street, N.W.
Washington, D.C.

APPENDIX 6

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA:

CIVIL DIVISION

CA No. 22207-70

HENRY J. WADDELL, *Plaintiff*

v.

PEPSI COLA COMPANY, *Defendant*

Order

In its review of the record of this case on appeal the District of Columbia Court of Appeals agreed with the defendant/appellant's contention that the plaintiff/appellee did not meet his burden of producing sufficient evidence to establish an act of negligence on the part of the defendant and to show that such act was the proximate cause of plaintiff's injury.

The Appeals Court concluded saying:

> "The evidence adduced at trial was not sufficient factually to permit a logical conclusion as to exactly what occurred and consequently it was insufficient to permit the submission of the case to the trier of fact. When the evidence requires a jury to speculate as to negligence or causation, a motion for a directed verdict must be granted."

Accordingly, the Court has no choice but to follow the mandate of the District of Columbia Court of Appeals and direct a verdict for the defendant, Pepsi Cola Company.

/s/ ORMAN W. KETCHAM
ORMAN W. KETCHAM, *Associate Judge*

APPENDIX 7

DISTRICT OF COLUMBIA COURT OF APPEALS

Case No. 12230

Henry J. Waddell, *Appellant*

vs.

Pepsi Cola Company, *Appellee*

Motion to Dismiss or In the Alternative for Summary Affirmance

Comes now the Defendant, Pepsi Cola Company, by and through its counsel, and moves this Court to dismiss the appeal filed herein, or in the alternative, to grant Summary Affirmance to it along with costs and attorney's fees should the Court find the same appropriate and as reasons therefor refers the Court to the Points and Authorities attached hereto and prayed to be read as a part hereof.

Gorman and Canfield

By /s/ .....
Austin F. Canfield, Jr.
Attorneys for Appellee
4400 Jenifer Street, N. W. #355
Washington, D. C. 20014
244-5695

(Caption Omitted in Printing)

Points and Authorities

Rule 42(c).

This is the second appeal in this case. This Court rendered its initial decision on May 15, 1973 in Pepsi Cola Company vs. Waddell, 304 A.2d 630, reversing a jury verdict against Pepsi Cola Company. The opinion concluded that the Plaintiff, Waddell, failed to meet essential elements of proof during the course of the trial. Lacking that proof, the Plaintiff had no case to present to the jury.

In 1976, counsel for Waddell requested and received a trial date from the Assignment Office whereupon it was the intention to retry the issues of Civil Action No. 22207-70. Thereafter, the Assignment Office was notified that the original case had been reversed outright and was not remanded back for a new trial. The case was thereupon removed from the trial calendar.

Thereafter, on the trial date of October 4th, notwithstanding the fact that the case had been removed from the trial calendar, the Plaintiff and his attorney appeared in Court prepared to go forward. A praecipe was then filed seeking a default to be entered against Pepsi Cola in light of the fact that no representative acting on its behalf was present. A copy of the praecipe was forwarded to this counsel and, thereafter, a letter was sent to the Judgment Officer suggesting that the praecipe was inappropriate and should not be received.

Thereafter, Waddell, through his counsel, filed an application for Judgment by Default subject to ex parte proof of damages and requesting a hearing thereon be set. Upon receipt of that praecipe, a letter was sent by this counsel to counsel for Plaintiff suggesting that it was inappropriate to attempt to schedule this case for another trial date in that the Court of Appeals had already ruled and the matter had been terminated by the decision. In responding, counsel advised this counsel that he would nevertheless continue to seek the default.

Thereafter, on March 23, 1977, counsel for Plaintiff, by praecipe, requested the case be referred to Judge Ketcham for a ruling. In an undated Order, Judge Ketcham ruled that he had no choice but to follow the mandates of the District of Columbia Court of Appeals. Thereafter, on April 8, 1977, Plaintiff noted this present appeal.

There is no merit to the present appeal. This court previously decided that Plaintiff failed to meet his burden of

proof and that Pepsi Cola Company was entitled to a Directed Verdict. The efforts to revitalize this case are both inappropriate and improper. They have cost Pepsi Cola Company additional time and money in seeking a final conclusion of this case. Should the Court feel it appropriate, counsel will be happy to file a statement as to the time of legal services involved which include not only those referred to above, but additional correspondence with the company itself.

This matter should be brought to a speedy and prompt conclusion. The appeal being without merit, it should be dismissed outright or in the alternative, Appellee should be granted Summary Affirmance.

GORMAN AND CANFIELD

By .....
AUSTIN F. CANFIELD, JR.
4400 Jenifer Street, N. W. #355
Attorney for Appellee
Washington, D. C. 20014
244-5695

APPENDIX 8

Civil Action No. 22207-70

No. 12230

HENRY J. WADDELL, *Appellate*

vs.

PEPSI COLA COMPANY, *Appellee*

Petition for Reconsideration and Hearing En Banc

Appellant lost part of his right index finger in an automobile collision on April 30, 1969. A jury awarded him $12,500.00 on April 11, 1972.

No judgment was entered on the jury verdict. Defendant filed a motion for a new trial and/or a judgment notwithstanding the verdict. Defendant's motion was denied and he appealed. The Appellate Court entered a judgment reversing the "judgment" of the trial court.

It was maintained that the judgment of the Appellate Court was null and void because there had been presented no appeal from a judgment of record in the court below. The case was placed on the ready calendar and was set for trial on October 4, 1976. On the date set for trial, defendant did not appear and the case was removed from that days trial calendar. The plaintiff made application to the civil motions court to enter a judgment for the plaintiff on the jury verdict or enter a default in favor of the plaintiff, or return the case to the trial calendar. An order was entered directing a verdict for the defendant, and the plaintiff appealed. The Appellate Court dismissed plaintiff's appeal.

The dismissal by the District of Columbia Court of Appeals of Appellant's appeal was done in violation of Appellant Waddell's constitutional rights. Appellant was denied due process of law and equal treatment of the law.

It is submitted that an appeal taken from a jurys verdict or decision of the court before judgment has been entered is premature and must be dismissed; further, a notation of a jury verdict is not entry of judgment and is not appealable, nor is the denial of a motion to set aside the verdict as against the weight of evidence appealable.

Some courts have disregarded the clear provision of rule (79A) that "every judgment must be set forth on a separate document and must be entered on the docket" and have accepted appeals, but a unanimous Supreme Court repudiated these few aberrant decisions and has held it a requirement that the judgment be set forth in a separate document and must be mechanically applied in all cases. See *U.S.* v. *Indrelunas 411 U.S. 916, 93, Supreme Court Reporter 1562; also Wright and Miller, Federal Practice and Procedure, Section 2781-2800.*

Respectfully Submitted,

/s/ William A. Burleson
William A. Burleson #135-277
Attorney for Appellant

Supreme Court, U. S.
FILED
APR 12 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1244

HENRY J. WADDELL, *Petitioner*,

v.

PEPSI COLA COMPANY, *Respondent*.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

WILLIAM A. BURLESON
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IN THE

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PETITIONER REFUTES RESPONDENTS MEMORANDUM

The defendant's settlement statement (appendix 1a) adopted in the court's pre-trial order, (appendix 2a), admits an undisputed fact that plaintiff lost the tip of his finger as a result of the collision between plaintiff's and defendant's vehicles. Plaintiff relies upon this admission of the causation as to the loss of his finger as being undisputed; the issue was negligence or contributory negligence on the part of the plaintiff and his assumption of risk as to his injury and this issue was decided by a jury.

After the jury returned its verdict for the plaintiff, the defendant was denied his JNOV and new trial motion by order of the trial judge (appendix 3a) from which defendant filed his untimely appeal (appendix 4a). No judgment was entered on the jury verdict, however the Defendant-Appellant-Respondent represented to the appellate court that a judgment had in fact, been entered on the jury verdict in his designation of record (appendix 5a). When it was ascertained that there had in fact, been no judgment entered for plaintiff on the jury verdict, the case was placed on the ready for Trial Calendar and a trial date of October 4, 1976, was set with notices being sent (appendix 2a). By his silence and inaction it appeared that counsel for Pepsi had no objection to the second trial, for which he did not appear or explain why; however, petitioner did have to respond (appendix 6a).

This court is presented with an appellate court decision (Respondents 1a) that reverses a judgment that did not exist in the trial court and when on page 2 of its opinion.

> "There are several differences in the testimony of the drivers of the car [Appellee] and truck [employee of Appellate] as to precisely what occurred at this point."

The fact that there are, as admitted by the Court, "several differences in the testimony" of the parties below places the matter squarely in the hands of the jury; and that being the case, the jury considered these differences, weighed the evidence, and made its findings of fact.[1]

---

[1] D.C. Code, Section 17-305(a) provides:

[continued]

However, we have an appellant who represents to the tribunal the correctness of the record by his designation of record wherein he states a judgment has been entered, when in fact, none has and who notes his untimely appeal from an unappealable order which results in the trial judge reversing himself because of a decision based upon a procedure which *this* court has repudiated. It is agreed that the issuance of the order directing a verdict for Pepsi was a nullity because the decision of the D.C. Court of Appeals was a nullity. The appellate court did not have jurisdiction on this case because appellants appeal was untimely, improper, and invalid and no judgment or final order had been entered by the trial court.

---

[1] (continued)

> "In considering an order of judgment of a lower court *** brought before it for review, the District of Columbia Court of Appeals shall review the record on appeal. When the issues of fact were tried by jury, the court shall review the case only as to matters of law.***"

CONCLUSION

Justice and the balancing of the interests require that this court issue a writ of certiorari to the District of Columbia Court of Appeals and Order that judgment be entered for plaintiff on the jury verdict of April 11, 1972.

Respectfully submitted,

WILLIAM A. BURLESON
1000 Pennsylvania Ave., S.E.
Washington, D.C. 20003
Attorney for Petitioner

Of Counsel:

Charles B. Hodson
114 Bullard Building
Chapel Hill, North Carolina

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

FORM [illegible]

SETTLEMENT STATEMENT

HENRY J. WADDELL
Plaintiff

Address

VS.

PEPSI COLA COMPANY
Defendant

Address

Calendar No. 8504-j - November 5, 1971
Judge Sorrell - 9:15 a.m.
Room 315, A Building

C.A. NO. 22207-70

SETTLEMENT STATEMENT OF DEFENDANT

(1) Brief Statement of the Nature of the Controversy.

On April 30, 1969, vehicle of defendant was making delivery at 7th and H Streets, N.E. Because of solid parking at curb, defendant's vehicle double parked just west of the west crosswalk of 7th Street. Plaintiff's vehicle proceeded out on 7th and made right turn into H and in process of so doing struck vehicle of defendant. While defendant's vehicle moved forward to separate vehicle after impact, plaintiff attempted to get out of his car through right passenger door and opened door in path of defendant's vehicle causing collision and loss of tip of plaintiff's finger.

(2) Concise Statement of Plaintiff's Claims:

(3) Concise Statement of Defendant's Defenses:

Defendant denies negligence and avers sole or contributory negligence of the plaintiff in opening door into path of moving traffic, failing to keep proper look-out for his own safety and exiting from car without caution. Defendant further avers plaintiff assumed the risk of injury.

(4) Concise Statement of Any Other Claims (cross-claims, counterclaims, or Third-Party claims and Respective Defenses Thereto:

(5(a) For Claimants: Itemization of special, general, residual or permanent damages or other relief sought.

(b) For Defendants: Itemization of matters in mitigation of damages or in opposition to relief sought.

BEST COPY AVAILABLE

(c) What is the maximum offer or minimum demand now acceptable to your client?

As this is not a case of liability, defendant is not willing to make any offer.

Respectfully Submitted,

GALIHER, CLARKE, MARTELL & DONNELLY

AUSTIN F. CANFIELD, JR.

Address of Signer

1215 - 19th Street, N.W.
Washington, D.C. 20036
337-8330

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed, postage prepaid this 3rd day of November, 1971, to William A. Burleson, Esquire, Attorney for Plaintiff, 1000 Pennsylvania Avenue, S.E., Washington, D.C. 20003.

AUSTIN F. CANFIELD, JR.
Attorney for Defendant

11th Cert. 8.

8504-J

22207-'70

District of Columbia Court of General Sessions

CIVIL ACTION NO._____

HENRY J. WADDELL

VERSUS

PEPSI COLA COMPANY

DATE	COURT CLERK'S MEMORANDUM	JUDGE
	Ready for Trial Calender	
3-1970		
3 1971	To be reset for settlement conference	Judge Malloy
5,71	Pretrial- Adopt statements as pretrial order, Trial date 1/20/72.	
13 1972	Ds Request for Cont'd is Granted Cont'd from Jan 20,72 to Apr. 10,72 Order signed here in	
10,1972	JURY EMPANELED AND SWORN, JURY RESPITED UNTIL APRIL 11, 1972 AT 9:30 AM. (WS)	Judge Ketcham
11,72	TRIAL RESUMED, AT CONCLUSION OF TRIAL, JURY RETURNS VERDICT FOR THE PLAINTIFF, IN THE AMOUNT OF $12,500.00 Actual. (WS)	Judge Ketcham
12,72	GISELE WHYTE OFFICIAL COURT REPORTER, MOTION FOR JUDGMENT N.O.V. - MOTION TAKEN UNDER ADVISEMENT. (WS)	Judge Ketcham
24,72	Motion for NOV/NEWTRIAL DENIED. Order Attached. to	Judge Ketcham
e 19,72	Notice of appeal Filed	
G 7 1972	Appeal Completed. Attorney Notified. pnh	
-6-73	Opinion & Certified Copy of Judgment from D.C. Court of Appeals filed. (WS)	

BEST COPY AVAILABLE

0 1976	Ready for Trial Calendar	
5 1976	~~Trial Date Set For~~ 10/4/76 Notice Sent.	

SUPERIOR COURT
CIVIL ASSIGNMENT OFFICE
440 G STREET, N.W. RM. 514
WASHINGTON, D.C. 20001

William A. Burleson Esq.
Attorney at Law
1000 Penn Ave. S.E.

WASHINGTON, D.C.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Calendar No. 5277-1 Civil No. 22207-70

HADDELL vs. PEPSI COLA CO.
Plaintiff *Defendant*

The above-captioned civil action has been set on the JURY Calendar for 10-4-76 at 9:30 A. M.

Should this trial date conflict with a previously set trial or appellate argument, you must appear before the Civil Calendar Control Judge within ten days of mailing of this notice to arrange for a different trial date to which other counsel consent. The failure of counsel to make such appearance is a representation to the Court that no conflict exists and renders the above date a firm trial date.

JOSEPH WEST
Assignment Commissioner

REPORT TO ASSIGNMENT OFFICE

M207—74

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

HENRY J. WADDELL,	:	
vs.	:	**CIVIL ACTION**
	:	**No. 22207-70**
PEPSI COLA COMPANY	:	

ORDER

Upon consideration of Defendant's Motion for Judgment N.O.V. or in the alternative, for New Trial, and the Plaintiff's Points and Authorities in Opposition, and the arguments of both counsel in open court at a hearing on the motion, the Court is of the opinion that Defendant's motion should be denied.

The Defendant alleges in its motion that the jury verdict was against the weight of the evidence in that the Plaintiff was unable to explain fully how he lost his finger in this accident. The Court, however, is of the opinion that there were sufficient facts established to enable the jury to make logical inferences and thereby reach a responsible decision as to the proximate cause of the injury without speculation.

There were several conflicting versions of how this accident happened. The Court acknowleges that, if the jury adopted the factual version upon which the Defendant relies, the accident was the result of the negligence of Plaintiff himself, and the Defendant could not be liable. However, the jury could and apparently did find other facts which established the negligence of Defendant's truck

driver so as to hold Defendant liable for Plaintiff's injury. It is also clear that Plaintiff acted unwisely in the circumstances. But whether his stopping his automobile in the center lane and getting out of the right side of the car to inspect the damage constituted contributory negligence and a proximate cause of the injury he sustained is open to question. Therefore, it was properly an issue to be decided by the jury. In the circumstances the Court does not believe that it should have taken the issue from the jury and directed a verdict.

The Defendant also alleges that the jury was distracted during the judge's charges to the jury because two U.S. Deputy Marshals entered the Courtroom. The Court noticed only a momentary shifting of some jurors' eyes because of their entry. If this minor interruption temporarily distracted the jury, the Court believes that it does not warrant a new trial.

The Defendant further argues that the Court erred in admitting into evidence the spontaneous utterance of the Defendant's driver to the Plaintiff made at the time of the accident to the effect that he "thought he could make it." The *res gestae* exception to the hearsay rule properly applies to such a statement and permits it to be admitted into evidence. Beyond this, of course, the Defendant's driver himself later took the stand to testify as to the entire context in which the alleged statement was made.

The Defendant also complains that the Court erred in admitting the entire deposition of the Plaintiff into evidence. The Court, however, is of the opinion that once the Defendant introduced part of the Plaintiff's deposition into evidence, Rule 32, subsection (a)(4) permitted the Plaintiff, as an adverse party, to require the introduction

of "any other part which ought in fairness to be considered with the part introduced . . .". Under the circumstances of this case, and with particular regard to the nervousness of the Plaintiff in his sincere efforts to recount the events of the accident in which he lost his right index finger, the Court is of the opinion that "fairness" required the admission of the entire deposition so as to give the jury the benefit of the Plaintiff's testimony taken under oath and subject to cross-examination, but taken under far less traumatic conditions.

WHEREFORE, it is the 23rd day of May, 1972, ORDERED, ADJUDGED and DECREED that Defendant's Motion for Judgment N.O.V. or, in the alternative for New Trial, be and hereby is DENIED.

/s/ ORMAN W. KETCHAM
Orman W. Ketcham
Associate Judge

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

HENRY J. WADDELL, *Plaintiff.*	:	
vs.	:	**No. 22207-70**
PEPSI COLA COMPANY, *Defendant.*	:	

[Filed June 19, 1972]

NOTICE OF APPEAL

Notice is hereby given that Pepsi Cola Company appeals to the District of Columbia Court of Appeals from the (order) of this court entered on the 23rd day of May, 1972.

Names and address of parties
or attorneys to be served:

William A. Burleson, Esquire
1000 Pennsylvania Ave., S.E.
Washington, D.C. 20003
Attorney for Waddell

/s/ AUSTIN F. CANFIELD
Austin F. Canfield, Jr.
Attorney for Pepsi Cola
1215 19th Street, N.W.
Washington, D.C. 20036
202–337-8330

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

HENRY J. WADDELL, *Plaintiff.*	:	
vs.	:	**Civil Action**
	:	**No. 22207-70**
PEPSI COLA COMPANY, *Defendant.*	:	

DESIGNATION OF RECORD

1. Complaint.
2. Answer
3. Deposition of Plaintiff
4. Jury Verdict and Judgment entered thereon
5. Motion of Defendant for Judgment N.O.V. or in the Alternative for New Trial
6. Order of Judge Ketchum dated May 23, 1972
7. Transcript of Proceedings

GALIHER, CLARKE, MARTELL & DONNELLY

AUSTIN F. CANFIELD, JR.
1215 19th Street, N.W.
Washington, D.C. 20036
202–337-8330
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed, postage prepaid, this 20th day of June, 1972, to William A. Burleson, Esquire, Attorney for Plaintiff, 1000 Pennsylvania Avenue, S.E., Washington, D.C.

AUSTIN F. CANFIELD, JR.

[Letter dated January 25, 1977]

WILLIAM A. BURLESON
Attorney at Law
1000 Pennsylvania Avenue, S.E.
Washington, D.C. 20003
(202)544-4111, 544-4115

Charles B. Hodson

Chapel Hill, N.C.
(919)942-5057

January 25, 1977

Cable:
Wilburl

Austin F. Canfield, Jr., Esquire
4400 Jenifer Street, N.W.
Washington, D.C. 20015

Re: Waddell v. Pepsi Cola Company
Civil Action No. 22207-70

Dear Mr. Canfield:

You leave me no alternative but to respond to your letters of October 13, and December 9, 1976. The circulation of your letters among court personnel has caused considerable confusion and embarrassment. As past President of the Bar Association your name and words carry a lot of weight with these court personnel. Frankly, you are the only lawyer I know of who can take a trial off the daily calendar; as you did this one. It bothers me when you threaten sanctions, particularly, when Mr. Waddell and his witnesses had to wait all day in court for his trial that was cancelled.

You know that judgment for the plaintiff was never entered in the above case, even though the jury awarded him $12,500.00. You stated to the Clerk of the Court that judgment had been entered for the plaintiff and you designated to the D.C. Court of Appeals, that a judgment had been entered for the plaintiff on the jury verdict. Neither is correct. You appealed from the denial of your motion for a Judgment N.O.V. and/or new trial. You and I both know that the most you ever contemplated was a re-trial of this case before a different trial judge, and that is what you indicated on June 19, 1972 when you offered Mr. Waddell $4.500.00 to keep you from filing your Notice of Appeal.

I am sure that you know that an appeal taken from a jury's verdict or decision of the court before judgment has been entered would be premature and would be dismissed. A mere notation of a jury verdict is not entry of judgment, it is not possible in any case for an opinion to have the effect of a judgment, and the denial of a motion for Judgment N.O.V. and/or a new trial is not appealable.

Some courts have disregarded the clear provision of rule 79(A) that "every judgment must be set forth on a separate document and must be entered on a docket", and have accepted appeals, but a unanimous Supreme Court repudiated these few aberrant decisions and has held it a requirement that the judgment be set forth in a separate document and must be mechanically applied in all cases. See *U.S. v. Indrelunas*, 411 U.S. 216, 93 *Supreme Court Reporter* 1562; also *Wright and Miller, Federal Practice and Procedure*, Sec. 2781-2800.

It would appear therefore that the Appellate Court in this case never had jurisdiction. Your appeal from the decision denying you Judgment N.O.V. and/or new trial motion was premature, no judgment has ever been entered for the plaintiff, and a court cannot reverse a judgment that never existed.

You are also aware that when this case was returned to Judge Ketcham he had it placed on the ready calendar and a new trial was set for October 4, 1976. At a pre-trial on another case, Judge Ketcham informed me that you had in fact discussed this matter of the Waddell re-trial with him. If anyone had been done an injustice it is Mr. Waddell. He is entitled to judgment on the jury verdict, including interest and costs. However, it appears that the trial court considered circumstances which it thought compelled it to grant a new trial. So, Mr. Waddell began preparation for the second trial scheduled for October 4, 1976. A further investigation was made, additional witnesses were discovered, and efforts were made to have the accident, injury, and scene simulated by experts. We appeared in the assignment office on October 4, 1976 ready to go out for trial, but in the afternoon were informed that you were not showing up and the case was being taken off that day's trial calendar. Naturally, I made application for default.

I am therefore asking that the Clerk enter Judgment including costs and interests for the Plaintiff on the jury verdict and let this case proceed to garnishment or appeal; or return this case to the trial calendar on which it was originally placed, or enter a default.

Sincerely,

/s/ WILLIAM A. BURLESON
William A. Burleson

cc: Clerk of the Civil Court

WAB/pms